

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION  
COMMISSION  
Appellate Panel

Susan S. Barden, Commissioner  
Melody James, Commissioner  
Aisha Taylor, Commissioner

---

Appellate Case No. 2017-000692  
Trial Court Case No. 1406130

---

Billy Wayne Herndon,  
Employee,

Claimant, Appellant-  
Respondent,

v.

G & G Logging, Inc.,  
Employer, and Palmetto  
Timber S.I. Fund c/o Walker,  
Hunter & Associates, Inc.,  
Carrier.

Respondents-  
Appellants.

---

FINAL BRIEF OF APPELLANT-RESPONDENT

---

**RECEIVED**

DEC 06 2017

SC Court of Appeals

s/ Andrea C. Roche  
Andrea C. Roche, Esquire  
Mickle & Bass, LLC  
Post Office Box 5639  
Columbia, South Carolina 29250  
(803) 929-0029  
aroche@mickleandbass.com  
SC Bar No. 7563  
Attorney for Appellant-Respondent

TABLE OF CONTENTS

Table of Authorities ..... ii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Facts ..... 2

Arguments

I. BECAUSE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION RELIED ON SURMISE AND SPECULATION IN DETERMINING THE CLAIMANT'S FUTURE EARNINGS, THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION.....4

II. BECAUSE THE ASSERTED LIMITATION ON THE CLAIMANT'S INCOME WAS TEMPORARY AND NOT INDICATIVE OF HIS PROBABLE FUTURE EARNINGS, THE COMMISSION ERRED IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION.....4

III. BECAUSE THE EMPLOYER WAS AWARE OF A POTENTIAL COMPENSATION RATE ISSUE FOR WELL OVER TWO YEARS AND FAILED TO ACT, THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ABUSED ITS DISCRETION BY FINDING THE DEFENDANTS WERE ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS.....8

Conclusion .....9

Certificate of Counsel .....10

TABLE OF AUTHORITIES

CASES

Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012)..... 4  
Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012) 4  
Elliot v. S.C. Dept. of Transportation, 362 S.C. 234, 237, 607 S.E.2d 90, 92 (Ct. App. 2004)... 5  
Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978)..... 5,7

STATUTES

S.C. Code Ann. § 42-1-40..... 5,8  
S.C. Code Ann. § 42-9-210..... 8  
42 U.S.C. § 402-403.....7  
20 C.F.R. 404.401..... 3,7

OTHER AUTHORITIES

The Administrative Procedures Act.....4  
Senior Citizens Freedom to Work Act (2000).....7

## STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION WHEN THE FINDING WAS BASED ON SURMISE AND SPECULATION REGARDING THE CLAIMANT'S PLANS TO WORK IN THE FUTURE?
2. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION WHEN ANY ASSERTED LIMITATION ON INCOME WAS TEMPORARY AND NOT INDICATIVE OF THE CLAIMANT'S PROBABLE FUTURE EARNINGS?
3. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THE DEFENDANTS WERE ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS WHEN THE DEFENDANTS PAID AT THE HIGHER RATE FOR WELL OVER TWO YEARS, AND THE EMPLOYER KNEW THERE WAS A POTENTIAL ISSUE WITH THE COMPENSATION RATE YET FAILED TO ACT?

## STATEMENT OF THE CASE

Billy Wayne Herndon ("the Claimant") requested a hearing in this admitted workers' compensation claim on August 18, 2015 against G&G Logging, Inc. ("the Employer") and its workers' compensation carrier Palmetto Timber Self Insurance Fund (collectively "the Defendants"). At a hearing on May 3, 2016, the Claimant argued his average weekly wage was \$695.00 with a resulting compensation rate of \$463.36 based on the actual wages he had earned with the Employer. (R. p. 65, lines 18-19) He further argued the admitted accident had rendered him permanently and totally disabled, entitling him to all benefits arising therefrom. (R. p. 63, line 25-p. 65 line 13)

At the hearing, the Defendants argued exceptional reasons existed to deviate from the standard wage calculation, and the Claimant was not permanently and totally disabled. (R. p. 67, line 1-p. 70 line 9) By order dated July 26, 2016, the Single Commissioner found (1) the

standard wage calculation as found on the Form 20 was correct, (2) the Defendants had not contested the standard wage calculation for over two years, and (3) the Claimant was permanently and totally disabled. (R. p. 18-25) The Defendants appealed.

By order dated February 23, 2017, the Full Commission affirmed the finding of permanent and total disability and reversed the finding regarding the wage calculation. (R. p. 49-50) The Full Commission found exceptional reasons existed to deviate from the standard wage calculation and found the Claimant's average weekly wage to be \$297.69 with a resulting compensation rate of \$198.47. (R. p. 48) The Full Commission also awarded the Defendants a credit for overpayment of benefits totaling \$36,527.82. (R. p. 49) The Claimant filed a Notice of Appeal to this Court on March 21, 2017.

#### FACTS

The Claimant sustained an admitted injury by accident arising out of and in the course and scope of his employment on May 12, 2014. (R. p. 43) The Claimant was involved in an accident while driving a logging truck. He sustained an injury to his neck that affected his left shoulder, left arm, left hand and fingers. (R. p. 48)

The Claimant worked as a logging truck driver for over twenty years. (R. p. 93, lines 4-11) In 2012, he attempted to retire, thinking at the time his Social Security would be enough to live. (R. p. 99, lines 17-19) Because his Social Security check did not prove adequate, he returned to work later in 2012 with Bootle, his employer for the last twenty years. (R. p. 99, lines 21-23) He drove for Bootle whenever he was called to help. (R. p. 100, lines 1-4, p. 119 lines 1-9) In 2012, he earned approximately \$7,700 and in 2013, he earned approximately \$8800. (R. p. 118, lines 7-22) He did not have any plan to limit his earnings with Bootle. (R. p.

118, line 23-p. 119 line 9) He testified that once he decided to return to work, he was going to work whenever he was needed. (R. p. 119, lines 1-9)

In 2014, the Claimant began working for the Employer. (R. p. 119, lines 10-12) He worked until the accident in May. (R. p. 119, lines 13-14) During the time he worked, he earned \$9,285. (R. p. 119, lines 15-18) Because the Claimant began drawing Social Security benefits before his full retirement age, he was subject to the Social Security earnings test. 42 U.S.C. § 403; 20 C.F.R. 404.401 *et. seq.* If he earned over a certain amount, Social Security would withhold certain amounts and return them once he reached full retirement age. Id. The Claimant testified regarding the earnings test threshold:

Q. And was it your intention in 2014 then to earn as much as you could without reducing your retirement benefits?

A. Yes, sir.

Q. And did you tell that information to George Page during your vocational evaluation?

A. I don't remember whether I did or I didn't.

Q. Okay. If he put it in his report do you have any reason to believe that he made that up or would that have been sometime [*sic*] you may have talked about?

A. No, we may have talked about it. I just – I don't remember for sure.

Q. Did you discuss that arrangement with Greg Gruber? [the employer]

A. Me and Greg talked about what I could make and then what we would do after I made that. We would make that decision when we got to that point.

Q. Okay. So y'all had a discussion about giving you work up to a certain point and that was about \$15,000?

A. And then we would discuss what we was going to do from then on.

(R. p. 119, line 19-p. 120, line 16)

The Defendants submitted a vocational report prepared by George Page. (R. p. 286) In the report, Mr. Page noted “Mr. Herndon retired at age 62 and began working part-time and revealed he could make up to \$15,000 per year. He noted he would work until reached \$15,000 and not work the rest of the year. He noted G&G Logging was aware.” (R. p. 288)

## ARGUMENTS

- I. BECAUSE THE SOUTH CAROLINA WORKERS’ COMPENSATION COMMISSION RELIED ON SURMISE AND SPECULATION IN DETERMINING THE CLAIMANT’S FUTURE EARNINGS, THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION.
- II. BECAUSE THE ASSERTED LIMITATION ON THE CLAIMANT’S INCOME WAS TEMPORARY AND NOT INDICATIVE OF HIS PROBABLE FUTURE EARNINGS, THE COMMISSION ERRED IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION.

“The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission.” Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). This Court can “reverse or modify the decision only if the claimant’s substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Substantial evidence is neither a “mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached.” Id.

Furthermore, in reviewing decisions of the Commission, the Court must consider two

principles. “First is the guiding principle undergirding our workers’ compensation system that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” Id.

Section 42-1-40 of the Workers’ Compensation Act governs calculation of the average weekly wage:

"Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. . . .

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-1-40. The determination of whether exceptional reasons exist to deviate from “the standard wage calculation method provided by the Workers’ Compensation Act is a question of law.” Elliot v. S.C. Dept. of Transportation, 362 S.C. 234, 237, 607 S.E.2d 90, 92 (Ct. App. 2004).

In Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978), the supreme court stated: “[t]he objective of wage calculation is to arrive at a fair approximation of the claimant’s probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings.” Id. at 98-99, 245 S.E.2d at 132.

It was surmise, conjecture, and speculation to find the Claimant was going to cease working once he reached the threshold of the Social Security earnings test. The Full

Commission and the Single Commissioner specifically found the Claimant was credible. (R. p. 47) The Claimant testified although he retired in 2012 thinking he would have enough money, he had to go back to work because the money he had was not enough to get by. (R. p. 99, lines 16-23) He testified he worked for Bootle in 2012 and 2013 with no plan to limit his earnings to the Social Security threshold, but rather just when Bootle needed someone to work. (R. p. 118 line 23-p.119 line 9) This testimony is uncontradicted in the record and is further bolstered by the fact there is no evidence the Claimant stopped working during 2012 or 2013. The only evidence in the record is he earned the amounts he did with Bootle because that is all the work Bootle offered to him. The Commission used the earnings for 2012 and 2013 as evidence that the Claimant was limiting his income because of the earnings test threshold, but there is absolutely no evidence in the record to support the Commission's finding.

The Claimant left Bootle and went to work for the Employer. The Claimant testified he and his Employer discussed the earnings test threshold, discussed that once the threshold was reached, they would further discuss and decide what the Claimant would do at that point. Although the Full Commission found the Claimant's testimony to be credible, it completely ignored this testimony and speculated that the Claimant would stop working once he reached the threshold. No one from the Employer testified. The Defendants offered no proof as to how the standard wage calculation required by § 42-1-40 would be unfair to the Employer.

The vocational expert hired by the Defendants included in his report the Claimant "noted he would work until he reached the \$15,000 and not work the rest of the year;" nevertheless, this is not borne out by the previous two years (no evidence the Claimant stopped work at any time during the year) and by the Claimant's credible testimony the he and his boss would discuss what direction to take once he reached the threshold.

Even if the Claimant had intended to work only to the threshold, this limitation on his income was temporary; in fact, it would have only lasted approximately six months from the time of his accident. After that he would no longer be subject to any reduction of Social Security benefits. 42 U.S.C. §§ 402-403. Therefore, any reliance on this temporary limitation of income to determine exceptional reasons to deviate from the standard wage calculation was error.

At the hearing below, the Defendants relied on Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978). In Bennett, the claimant, due to Social Security's earnings test threshold, worked for a few months and then quit for the rest of the year once he reached the threshold. He did this for nine years. The Commission's decision in Bennett was not based on speculation or surmise; it was based on the evidence that for nine years the claimant would stop working once he reached the threshold. At the time, the earnings test threshold applied to all recipients of Social Security retirement benefits, regardless of age. See Senior Citizens Freedom to Work Act (2000). As the law stood then, there was no time in the future where the earnings test threshold would not apply to the claimant in Bennett.

In contrast, for the Claimant in the case at bar, the earnings test threshold would be greatly increased on January 1, 2015 (from \$15,720 to \$41,880—an amount above what he was on schedule to earn for the Employer) and completely cease to exist in 2016. 20 C.F.R. §§ 404.401 *et seq.* Therefore, at the very least, the Social Security earnings test would have affected the Claimant's "probable future earning capacity" and "probable future earnings" for a very small period of time (6½ months). The Commission appears to have not considered the temporary nature of the earnings limitation, as it is not mentioned at all in its order. By failing to consider any limitation on his earning was very short-lived, the Commission erred by failing to "arrive at a fair approximation of his future earning capacity."

In conclusion, the Commission relied on surmise and conjecture in determining what the future held for the Claimant upon reaching the earnings test threshold. Also, the Commission failed to consider the short-term effect any earning limitation would have of the Claimant's future earning capacity. The Claimant therefore requests this Court reverse the Commission and reinstate the average weekly wage as determined by the standard wage calculation method of § 42-1-40 of the Workers' Compensation Act or remand the case to the Commission to consider the short-term effect of the earnings limitation in computing a fair approximation of the Claimant's future earning capacity.

III. BECAUSE THE EMPLOYER WAS AWARE OF A POTENTIAL COMPENSATION RATE ISSUE FOR WELL OVER TWO YEARS AND FAILED TO ACT, THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ABUSED ITS DISCRETION BY FINDING THE DEFENDANTS WERE ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS.

Section 42-9-210 of the Workers' Compensation Act provides that "[a]ny payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made *may*, subject to the approval of the commission, be deducted from the amount to be paid as compensation." S.C. Code Ann. § 42-9-210 (emphasis added). Whether to award a credit is within the discretion of the Commission.

Assuming, *arguendo*, the Claimant intended to limit his income, the evidence in the record is clear the Employer was aware. The Claimant testified he discussed the issue with his Employer. The vocational report upon which the Defendants so heavily rely states the Employer was aware. Contrary to the assertions of defense counsel below, and the clearly erroneous finding of the Full Commission that these issues were not known until discovery, the Defendants, through the Employer, were aware of this issue all along. The Employer knew for the almost

three years it was paying temporary total disability at the higher rate. The Defendants could have easily requested a hearing at any time to address the average weekly wage issue.

Due to the Defendants' failure to act, the Commission abused its discretion by awarding the credit to the Defendants. The Claimant requests this Court reverse the finding of a credit for overpayment if the lower average weekly wage stands.

#### CONCLUSION

For the reasons stated, this Court should reverse the decision and order of the South Carolina Workers' Compensation Commission as to the average weekly wage or, in the alternative, remand this case to the Commission.

December 6, 2017

Respectfully submitted,

s/ Andrea C. Roche  
Andrea C. Roche, Esquire  
Mickle & Bass, LLC  
Post Office Box 5639  
Columbia, South Carolina 29250  
(803) 929-0029  
[aroche@mickleandbass.com](mailto:aroche@mickleandbass.com)  
SC Bar No. 7563  
Attorney for Appellant-Respondent

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

Appellate Case No. 2017-000692

Billy Wayne Herndon, Employee/Claimant .....Appellant-Respondent,

v.

G & G Logging, Inc., Employer, and  
Palmetto Timber S.I. Fund c/o Walker,  
Hunter & Associates, Inc., Carrier .....Respondents-Appellants.

---

**CERTIFICATE OF COUNSEL**

---

The undersigned hereby certifies that the Final Brief of Appellant-Respondent complies  
with Rule 211(b), SCACR.

s/ Andrea C. Roche  
Andrea C. Roche, Esquire  
Mickle & Bass, LLC  
Post Office Box 5639  
Columbia, South Carolina 29250  
(803) 929-0029  
aroche@mickleandbass.com  
SC Bar No. 7563

Attorney for Appellant-Respondent

**RECEIVED**  
DEC 06 2017  
SC Court of Appeals